



November 12, 2001

Defense Acquisition Regulation Council  
Attn: Mr. Rick Layser, OUSD (AT&L) DP (DAR)  
IMD 3C132  
3062 Defense Pentagon  
Washington, DC 20361-3061

Dear Mr. Layser:

The Aerospace Industries Association (AIA) appreciates the opportunity to submit the following comments in response to DFARS Case 2000-D028, Subcontract Commerciality Determinations, published in the Federal Register page 47159 dated 11 September 2001.

The DAR Council proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify the responsibilities of contractors and administrative contracting officers regarding determinations of commerciality for items being procured by the contractor in support of contracts with the DoD.

We believe the proposed rule is a necessary clarification that will maximize the potential for prime contractors and their subcontractors to incorporate commercial items as components of items to be supplied under the prime contract. FAR 44.402(a) states very clearly the US Government policy that "Contractors and subcontractors at all tiers shall to the maximum extent practicable.. be required to incorporate commercial items or nondevelopmental items as components of items delivered to the Government.. ." FAR Clause 52.244-6 makes that responsibility equally clear.

However, the FAR is unclear with regard to the responsibility for making the determinations of commerciality necessary to support this policy. AIA believes the proposed rule should make it absolutely clear that the determination of the commerciality of an item to be subcontracted is the responsibility of the individual charged with the responsibility of awarding the purchase order. In this respect, the individual making the determination is functioning in the same role as the PCO in reviewing the market research and making a determination that the contractor's need can be met by a commercial item. FAR 10.002 (d)(1) makes it clear that the PCO is the sole individual responsible for determining that a commercial item can meet the Government's need when it says "If market research establishes that the Government's need may be met by a

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type of item or service customarily available in the commercial marketplace.. the contracting officer shall solicit and award any resultant contract using the policies and procedures in Part 12.” The FAR language is based on the belief that the PCO is in the best position to make determinations of commerciality after reviewing market research in the context of the Government’s needs; so too are the contractor’s procurement personnel in the best position to evaluate their market research and determine the availability of commercial items to meet the contractor’s need in support of its contract.

With regard to oversight of the contractor’s commerciality decisions, FAR 44.303 presently excludes subcontracts for commercial items from CPSRs when it says “. . . this evaluation shall not include subcontracts.. . awarded for commercial items pursuant to part 12.” AIA believes that the proposed language in DFARS 244.303 would be inconsistent with the related FAR coverage at 44.303. In this regard, AIA also believes the proposed language at DFARS 244.303 is inconsistent with the spirit of 12.301 (f) which prohibits agencies from supplementing FAR policies regarding commercial items except to implement agency unique statutes and Executive Orders.

The Commercial Item Designation IPT, chartered by the DOD SPI Executive Council, identified several impediments to greater DOD use of commercial items. One of the impediments was the lack of clear guidance with regard to who had the responsibility for determining commerciality for subcontracted items. The proposed rule would resolve this issue. The IPT also identified other impediments to greater use of the flexibility provided by Part 12. We believe that the proposed language at 244.303 would likely create another impediment to use of the policies in Part 12 on the part of contractor procurement personnel by resulting in ACOs -being asked to review determinations in advance to avoid issues arising later, during a CPSR. Such an outcome could defeat the intent of clarifying that commerciality decisions for subcontracted items are a contractor responsibility. Commerciality is clearly a matter of business judgment. ..to encourage contractors to incorporate commercial items at the subcontract level as envisioned by the statute,’ the contractor should be charged with the sole responsibility for making commerciality determinations.

The reference to FAR 15.403-1(c)(3) is unnecessary here in that it pertains to the exceptions from obtaining cost or pricing data and does not clarify that the responsible party for making the commercial item determination is the contractor or lower tier subcontractor.

We offer the following comments to the draft language:

244.303 ~~Extent of Review~~

~~Also review the adequacy of rationale documenting commercial item determinations to ensure compliance with the definition of “commercial item” in FAR 2.101.~~

244.402 Policy Requirements

Contractors and subcontractors at all tiers have the responsibility to must  
determine whether a particular need can be met by a commercial item  
subcontract item meets the definition of a commercial item--(but see FAR  
15.403-1 (c) (3)). Contractors are expected to exercise reasonable business  
judgement in making such determinations >  
~~conducting market research in FAR Part 10~~

We believe these recommended changes will establish the desired clarification of responsibilities while permitting reasonable business judgement to prevail in the process.

If further information is required, please contact the undersigned at 202-371-8522.



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